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In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID L. SCHURGIN, PETITIONER

v.

UNITED STATES OF AMERICA

STANLEY RIMAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 77-771

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No. 77-5755

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 558 F. 2d 1271.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-771.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1977. In No. 77-771 a petition for rehearing was denied on November 4, 1977, and the petition for a writ of certiorari was filed on November 29, 1977. In No. 77-5755 a petition for rehearing was denied on October 27, 1977, and the petition for a writ of certiorari was filed on November 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the simultaneous prosecution of each petitioner and two other defendants in a single proceeding before separate finders of fact was improper.

2. Whether the evidence was sufficient to show that the automobile air compressors that petitioner Schurgin possessed had been stolen from interstate commerce (No. 77-771 only).

3. Whether petitioner Schurgin voluntarily consented to the search of his warehouse (No. 77-771 only).

4. Whether the prosecutor impermissibly amended the indictment (No. 77-771 only).

5. Whether, in the circumstances of this case, petitioner Rimar is entitled to a new trial because he was convicted of both theft and possession of the same property (No. 77-5755 only).

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of Michigan, petitioner Schurgin was convicted of possession of goods with knowledge that they had been stolen from interstate commerce, in violation of 18 U.S.C. 659. He was sentenced to 18 months' imprisonment. In the same proceeding,[2] petitioner Rimar was found guilty by a jury of aiding and abetting the theft of goods stolen from interstate commerce, and of possession of goods stolen from interstate commerce, in violation of 18 U.S.C. 659 and 2. He was sentenced to six years' imprisonment.[3]

The evidence is summarized in the opinion of the court of appeals (Pet. App. 2a-4a). On April 16, 1974, a trailer that was loaded in Chicago, Illinois, arrived at the Ford Motor Company's assembly plant in Dearborn, Michigan. The trailer contained automobile air compressors. The trailer was placed in a parking area known as the "bull pen," awaiting delivery to an unloading dock by another tractor driver known as a "switcher," who was employed by an independent trucking firm.

Lloyd Witherite, a "switcher," had an arrangement with Russell Barber, a Ford security guard, to "look the other way" for a price while Witherite stole trailers from the "bull pen." On the night of April 16 Barber permitted Witherite to drive the trailer load of compressors out of the Ford complex. Witherite sold the stolen cargo to petitioner Rimar for $14,400, a price that had been negotiated before Witherite stole the trailer. Early the following morning Rimar transferred the cargo into another trailer, and John Chila delivered the compressors

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[2]Petitioners, together with Russell P. Barber and John James Chila, were tried in the same courtroom at the same time. The judge sat as trier of fact as to petitioner Schurgin and Barber, both of whom had waived jury trial. One jury was empanelled to hear the case against petitioner Rimar, and another jury heard the case against Chila. Chila was acquitted. Barber's conviction was affirmed, and this Court denied certiorari on December 5, 1977 (No. 77-312).

[3]The district court dismissed the possession count after the jury verdict.

to petitioner Schurgin at the warehouse of Schurgin's company, Original Equipment Manufacturers (O.E.M.) Employees of O.E.M. removed the identification plates, repackaged the compressors, and shipped some of them to another company.

On May 14, 1974, FBI agents searched the O.E.M. warehouse and found approximately 440 air compressors and several serial plates matching those of the stolen goods. The remaining compressors were later recovered from the company that had purchased them from petitioner Schurgin.

ARGUMENT

1. Prior to trial the district court concluded that *Bruton* v. *United States*, 391 U.S. 123, required that certain of the four defendants be tried separately. Because most of the prosecution's evidence would be admissible against all defendants, and because much of each defendant's evidence could be presented with the other defendants present, the court concluded that, in the interest of judicial economy, all defendants would be tried at the same time but before separate factfinders. The trial judge sat as trier of fact concerning Barber and petitioner Schurgin, while separate juries heard the evidence concerning Chila and petitioner Rimar.

Both petitioners contend that this procedure violated the principles of *Bruton*. Neither petitioner, however, objected to this procedure either before or during trial; the objection now comes too late. In any event, there was no error here.

a. Petitioner Schurgin contends (Pet. No. 77-771, pp. 7-9) that he was denied a fair trial because of the confusion necessarily engendered by the trial court's decision to conduct four separate trials simultaneously.

Although petitioner points to no specific incident of confusion, the court of appeals acknowledged (Pet. App. 4a) that several times during the course of proceedings the trial judge incorrectly identified the defense attorneys, referred to their clients by the wrong name, or showed some momentary confusion about which jury was sitting in which case. As the court of appeals observed, however, most of these incidents took place outside the presence of the juries (*ibid.*). The "confusion" was no more than naturally occurs in multi-defendant trials, and it was not caused or enhanced by the use of multiple juries. Furthermore, when misstatements did occur, the court promptly corrected itself or the attorney involved and instructed the jury accordingly.

The court of appeals recognized that the district court was "very much aware of the potential for error inherent in the procedure and * * * moved cautiously in areas where the rights of particular defendants were or could have been involved" (*ibid.*). The court of appeals thoroughly reviewed the record, concluding that while the procedure here was "unusual" (*ibid.*), it did not result in "any continuing confusion so pervasive as to render the trial unfair" (*ibid.*).[4]

b. Petitioner Rimar fares no better in his argument that he was prejudiced by references to statements made by Barber and Chila. He concedes (Pet. No. 77-5755, p. 8) that the statements were not introduced against him. Moreover, with respect to the prosecutor's comment

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[4]The juries rendered discriminating verdicts, finding Rimar guilty on both counts of the indictment while acquitting Chila (Pet. App. 1a-2a).

concerning Barber's statement,[5] petitioner Rimar concedes (*id.* at 9) that "the Court sustained [his] objection * * * and further instructed the jury that it was not relevant and did not corroborate [any evidence] against [petitioner]." That being so, the prosecutor did not use against Rimar any material not subject to effective cross-examination in the statement of a non-testifying co-defendant. In any event, because Witherite's testimony against Rimar was corroborated by credible evidence (*e.g.*, Rimar Tr. 589-593), the prosecutor's reference to Barber's allegedly corroborative statement—even if the reference amounted to the use of the statement—told the jury nothing it did not already know and was harmless. See *Brown* v. *United States*, 411 U.S. 223, 231-232.

The prosecutor's reference to Chila's statement about the location of the compressors, and a defense counsel's characterization of Chila as an admitted accomplice (see Pet. No. 77-5755, pp. 9-10), were no more prejudicial. Petitioner admits (*id.* at 6) that the court gave cautionary instructions in both instances and, as the court of appeals stated (Pet. App. 4a), quoting from *Bruton* v. *United States, supra*, 391 U.S. at 135, "[i]t is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such [improperly submitted] information."[6]

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[5]During a discussion in the presence of Rimar's jury about the admissibility of Barber's statement, the prosecutor argued that Barber's statement would corroborate Witherite's testimony (Rimar Tr. 432).

[6]*United States* v. *Bozza*, 365 F. 2d 206 (C.A. 2), on which Rimar relies, is distinguishable. In *Bozza* a defendant's confession that was introduced into evidence corroborated an accomplice's testimony for the government and had the practical effect of directly implicating the co-defendants in the crimes charged. *Id.* at 214-215. Moreover, there was great doubt that the jury heeded the judge's instructions to consider the confession only against the defendant who had made it. *Id.* at 215. Here, by contrast, the references to other statements were fleeting and the court's correction was immediate.

Petitioner Rimar's further argument (Pet. No. 77-5755, pp. 11-12) that a transcript of Barber's and Chila's statements was improperly included among exhibits given to the jury is insubstantial. That error was discovered and corrected approximately five minutes after the jury had received the exhibits (*id.* at 11). A hearing revealed that none of the jurors had read any of the incriminating statements, and petitioner's counsel withdrew his request for a mistrial (Rimar Tr. 1085-1090). Petitioner Rimar was not affected by submission to the jury of the unauthorized material.[7]

2. Petitioner Schurgin contends that the trailer load of compressors was not in interstate commerce when it was stolen, and thus that the theft was not within the reach of 18 U.S.C. 659. He argues that the shipment lost its interstate character when it was left in the "bull pen" (Pet. No. 77-771, p. 10). This contention is incorrect.[8]

The determination whether a shipment is in interstate commerce for the purposes of 18 U.S.C. 659 is "essentially a practical one based on common sense." *United States* v. *Astolas*, 487 F. 2d 275, 279 (C.A. 2), certiorari denied, 416 U.S. 955. It "depend[s] upon the relationship between the

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[7]Petitioner Rimar's reliance on *Osborne* v. *United States*, 351 F. 2d 111 (C.A. 8), is unwarranted. In *Osborne*, "a close and a difficult" case, highly prejudicial material was improperly submitted to the jury and was "likely" examined by the jurors during their "long deliberation" over two working days. 351 F. 2d at 118, 119. That case bears no resemblance to this.

[8]Barber raised this issue in his petition for certiorari, which the Court denied. See note 2, *supra*.

consignee, the consignor, and carrier, the indicia of interstate commerce at the time the theft occurs, and the preservation of the congressional intent." *United States* v. *Gates*, 528 F. 2d 1045, 1047 (C.A. 5), certiorari denied, 429 U.S. 839. Contrary to petitioner's assertion, Ford had not "accepted and assumed dominion and control over the goods prior to the time of the alleged theft" (Pet. 13). According to testimony by Ford employees and carrier representatives, although the goods had been brought to Ford Motor Company property, Ford had not accepted the shipment nor had any attempt been made to unload the goods. Under the procedure followed at the Ford plant, delivery would not have been completed at least until the trailer was taken by a "switcher" to an unloading dock and the cargo removed (Barber Tr. 11, 15, 24-30; Rimar Tr. 25-29, 32-33; H. 151, 157).[9] See *Winer* v. *United States*, 228 F. 2d 944, 947-948 (C.A. 6), certiorari denied, 351 U.S. 906; *United States* v. *Cousins*, 427 F. 2d 382, 384-385 (C.A. 9). Accordingly, as the district court concluded (Pet. App. 8a), the "undisputed evidence" established that the stolen shipment retained its interstate character.[10]

3. The search at the O.E.M. warehouse resulted in the discovery and seizure of 440 of the stolen automobile compressors. Petitioner Schurgin argues that he did not voluntarily consent to this search. This contention is refuted by the record.

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[9]"H." refers to the transcript of the suppression hearing.

[10]There is no conflict among the circuits concerning the proper application of the statute. *United States* v. *Cousins*, *supra*, and *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8), cited by petitioner, recognize that the determination of the interstate character of a shipment turns on the particular facts and circumstances of each case.

A hearing was held before trial on Schurgin's motion to suppress the evidence seized at the warehouse. According to an FBI agent who participated in the search, he and three other agents, acting pursuant to information supplied by Chila, went to the O.E.M. Company on May 14, 1974. After identifying themselves, they told Schurgin that they had reason to believe that the stolen air compressors were on the premises (H. 3). When the agents asked if they could look through the plant for the compressors, petitioner readily gave his permission and led the agents on a tour of the premises (H. 21). While in the warehouse, one of the agents saw two crates that matched the description of those containing the stolen compressors (H. 22).

After the brief tour, Schurgin said that he wanted to talk to an attorney. Following a phone call to his attorney, Schurgin told the agents that he would agree to a search of the premises. He then signed a "consent to search" form; no threats were made to induce him to sign the form (H. 23-26).[11] Petitioner testified that he read and signed the consent form (H. 55-56).

After the form was signed, the agents began to search the warehouse and found one of the stolen air compressors. When Schurgin was informed of this, he stated that he desired to confer with his attorney again (H. 28). Following a telephone conversation, petitioner told the agents that his attorney was coming to the O.E.M. warehouse; the agents stopped the search and waited for

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[11]Before petitioner signed the consent form, he requested that the agents strike from the form a phrase that would have allowed the seizure of "letters and papers". The agents complied with the request and petitioner signed the form (H. 25).

petitioner's attorney to arrive (*ibid.*). The attorney told the agents to "[g]o ahead and continue the search." The agents then discovered 439 other stolen air compressors (H. 29).

This record shows that petitioner freely and voluntarily consented to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 233; *United States* v. *Watson*, 423 U.S. 411, 424.

4. Petitioner Schurgin's additional claim (Pet. No. 77-771, pp. 13, 17) that the prosecutor impermissibly "amended" the indictment by adducing proof at trial that varied significantly from the allegations of the indictment is unpersuasive. Count II of the indictment charged both petitioners and Chila with possession of the air compressors on April 17, 1974, with knowledge that they were stolen (Pet. No. 77-771, p. 15). The evidence adduced at trial showed that on April 17 Rimar transferred the cargo into a trailer and delivered the compressors to Schurgin's warehouse where, pursuant to Schurgin's instructions, the goods were unloaded and the serial plates removed. Thus there was no variance between the indictment and the proof at trial and no danger that petitioner was convicted of a charge not found by the grand jury. Cf. *Stirone* v. *United States*, 361 U.S. 212, 219.

5. Petitioner Rimar was found guilty of both theft and possession of the stolen merchandise. The district court entered a sentence only on the theft count. Petitioner contends (Pet. No. 77-5755, pp. 13-15) that, because the theft and possession counts went to the jury without an instruction that he could not be convicted on both, he is entitled to a new trial on the theft count. The court of appeals held (Pet. App. 5a) that, in the circumstances of this case, dismissal of the possession count was the appropriate remedy. There is no reason to review that ruling.

In *United States* v. *Gaddis*, 424 U.S. 544, this Court held that dismissal of the possession count usually would suffice to correct an erroneous submission on both counts. *Gaddis*, like this case, was one in which the defendants committed a continuous series of acts involving both theft and retention of the booty.[12] Although here, unlike the case in *Gaddis*, there was some evidence of possession, there is no reason to believe that the jury that convicted petitioner of both charges would have acquitted him of the theft had it been told that it could convict him of either the theft or possession but not both. The proper response to a finding of guilt on both counts therefore was to enter a conviction on the theft count alone.

The courts of appeals that have considered the problem since *Gaddis* have held that, in all but extraordinary circumstances, the failure to instruct the jury to elect between offenses may be cured by vacating the conviction for the lesser of the offenses. See, *e.g.*, *United States* v. *Bracken*, 558 F. 2d 544 (C.A. 9); *United States* v. *Ortiz-Martinez*, 557 F. 2d 214 (C.A. 9); *United States* v. *Gilbert*, 553 F. 2d 990 (C.A. 5); *United States* v. *Lindsay*, 552 F. 2d 263 (C.A. 8); *Proffitt* v. *United States*, 549 F. 2d 910 (C.A. 4); *United States* v. *Solimine*, 536 F. 2d 703 (C.A. 6), vacated on other grounds, 429 U.S. 990; *Gentry* v. *United States*, 533 F. 2d 998 (C.A. 6); *United States* v.

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[12] *Gaddis* distinguished *Milanovich* v. *United States*, 365 U.S. 551, where the defendant was convicted of both stealing and receiving stolen property, in light of its "very unusual facts." 424 U.S. at 548. Seventeen days had elapsed between the theft and the first time the defendant received any of the proceeds; the evidence showed that the defendants had committed separate crimes. In the present case Rimar participated in a continuous operation.

Sellers, 547 F. 2d 785 (C.A. 4), certiorari denied, 429 U.S. 1075. There is no reason for the Court to review the decision here, which is supported by this consensus.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.

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